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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDWARD DEMOND CONWAY,<br><br>Defendant and Appellant. | B191396<br><br>(Los Angeles County<br>Super. Ct. No. BA289492) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed as modified.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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Edward Demond Conway appeals from the judgment entered upon his convictions by jury of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 1)[1] possession of a firearm by a felon (§ 12021, subd. (a)(1), count 2), carrying a concealed firearm (§ 12025, subd. (a)(2), count 3), carrying a loaded firearm in a public place (§ 12031, subd. (a)(1), count 4) and possession of ammunition by a felon (§ 12316, subd. (b)(1), count 5). The jury also found to be true the allegation in connection with count 1 that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Appellant admitted having suffered a prior serious felony within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) and two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced him to an aggregate state prison term of 15 years four months. Appellant contends that (1) the trial court erred in allowing evidence of threats received by an eyewitness, depriving him of his constitutional rights to a fair trial and due process, (2) the trial court erred in limiting defense counsel's cross-examination of the victim, depriving him of his constitutional rights to confront and cross-examine his accuser, to a fair trial, to due process and to present a defense, (3) the trial court erred in refusing to strike evidence of the contents of appellant's backpack, thereby depriving him of his constitutional rights to a fair trial and to due process, (4) the errors at trial cumulatively require reversal, and (5) the prior prison term sentences must be stricken.

We strike the two prior prison terms and otherwise affirm.

## FACTUAL BACKGROUND

### *The prosecution's evidence*

*The assault*

On August 30, 2005, between 11:00 p.m. and 2:00 a.m., Wendy Marroquin and her friends, Kelly Cirieco and Ashton, were at a nightclub in Hollywood. As they were

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

leaving, appellant either grabbed Marroquin's arm or put his arm around her. She had seen him before, but did not know him. She told him to "get off [her]." When he did not comply, she repeated her demand. When appellant then grabbed her tighter, Marroquin broke a glass in his face, cutting her hand and his face. Appellant grabbed her hair, forced her neck up, and began choking her. Airika Hartzog, who first met Marroquin that night at the club, saw this and attempted to help her. Hartzog was hit and flew backward. A security guard pulled appellant off of Marroquin.

Marroquin walked downstairs and looked for the valet to retrieve her car. As she waited, appellant walked up to her and punched her, knocking her to the ground; he then kicked her and stomped on her face. She lost consciousness and was bleeding.

Club security flagged down a nearby ambulance that took Marroquin to the hospital for treatment. As a result of appellant's attack, she suffered a fractured left eye, bruises around both eyes, a bruised eyebrow and upper nose, bruises and swelling of her lips and face, and scratches and bruises on her arms, shoulder, and neck. An impression of a shoe was left across her face and forehead. She received stitches to her finger. When released from the hospital, she required use of a wheelchair, suffered back spasms for a few months and required pain medications.

Officer Aaron Green and his partner, Officer Granados, responded to the scene. They interviewed Cirieco both inside the club and later at the hospital. She was upset and concerned for Marroquin. According to Officer Green, Cirieco gave essentially the same version of what she had seen on both occasions. She said that she saw a man put his arm around Marroquin's neck, knock her to the ground and kick and stomp her face. She feared she would be next because of her friendship with Marroquin, so she ran across the street. In the second interview, she also indicated that she could identify Marroquin's attacker, whom she described as five feet seven inches tall, wearing a blue and white striped shirt, blue jeans and white shoes.

After appellant's arrest, Detective Padilla created a six-pack using the recent booking photograph of appellant. On August 31, 2005, Cirieco identified the photograph of appellant in the six-pack and wrote that he was the man "who beat up Wendy

Marroquin. I saw him kick her in the face a couple of times and stomp on her face." She added, "That is the guy. I am positive."

At trial, Cirieco's story changed. She testified that she did not see Marroquin's hair being pulled or being hit outside. Patrons were running, so Cirieco also ran, not knowing what was happening. She began to call police on her cell phone because she knew something had happened to Marroquin, but did not complete the call because she heard sirens and saw Marroquin being placed in an ambulance. Cirieco did not remember telling Officer Green that appellant punched Marroquin and stomped on her face, or even talking to him outside the club or at the hospital. She could not remember the race of Marroquin's attacker, did not see the attack, did not see anyone touch Marroquin, and did not see Marroquin during the attack. She denied telling Officer Green shortly before testifying that she was afraid. She testified that she lost her memory about the incident shortly after it occurred.

*Appellant's arrest and the weapons charges*

On August 30, 2005, at approximately 2:00 p.m., from inside vans, detectives from the Los Angeles Police Department fugitive warrant section and United States Marshals maintained a surveillance of the perimeter around an apartment building in Inglewood, where they expected appellant. Officer John Ferreria, working with United States Marshals Jason Grunwald and Montana, saw appellant standing next to another African-American male and advised units to move in for the arrest. The officers identified themselves and were wearing vests which said "U.S. Marshal" or "L.A.P.D." As they approached, the second individual ran off and was not detained. Appellant ran southbound. When cornered, he ran toward Officer Ferreria. The officer tackled him, causing him to drop a backpack he was wearing, and placed him in a bear hug. Appellant was ordered to stop resisting, which he did. Marshal Grunwald conducted a patdown search of appellant, confiscating a firearm with a magazine containing ammunition from appellant's waistband. The marshal subsequently searched the backpack, but did not find any weapons, ammunition or clips. He found a woman's purse, identification, makeup bag, sex toy, change and credit cards inside.

Officer Ferreria and Detective Masterson transported appellant to Parker Center for booking. While they were sitting with him on a bench, Marroquin, who had come with Detective Padilla to the Parker Center Scientific Investigation Division to photograph her injuries after her release from the hospital, passed by him. Appellant saw her and muttered, "Oh, shit. That's the girl that got beat down." Marroquin pointed at appellant and said to Detective Padilla, "Hey, that's him."

Detective Padilla spoke with Detective Masterson and explained the situation. Detective Masterson saw the shoe imprint on Marroquin's face and looked at the sole of appellant's shoes. The pattern of the sole was consistent with the imprint on Marroquin's face, and there was dried blood in the crevices of the sole.

*The defense's evidence*

On August 30, 2005, Skylar McKnight, a friend of appellant from college, was at the nightclub with him. Aerial Johnson (Aerial), who had known appellant for three to five years, was also there. McKnight was mingling with friends on the dance floor and saw appellant talking with Marroquin. Both McKnight and Johnson saw Marroquin grab her glass and hit appellant in the face with it. Neither saw appellant do anything to Marroquin first. Appellant slipped on either the broken glass or the wet floor and fell to the ground, bleeding under his eye. Marroquin was on top of him and preparing to hit him again. Aerial saw Marroquin, cursing and screaming at appellant. McKnight saw some girls rush to Marroquin and start to fight. McKnight went to help appellant, and security came over and helped appellant up, carried him out of the club. Once outside, the security released him.

Outside of the nightclub, McKnight and Aerial saw five or six females including Marroquin fighting. At no time did McKnight see Marroquin with any injuries.

On August 31, 2005, between 11:00 a.m. and 1:00 p.m., appellant went to his friend, Beatrice Alva's woman's clothing boutique in Inglewood. He was wearing a blue shirt with blood on it, and his face was cut. He told her that he had been hit in the face with a glass. Appellant had a couple of white T-shirts at her store. He changed his shirt

and indicated that he would be right back, but did not return. Appellant later called Alva from jail and told her to keep the shirt for him, which she did and brought it to trial.

On August 30, 2005, at approximately 2:15 p.m., Tony Johnson (Tony) observed appellant, an acquaintance, walking out of the same building Tony was visiting, in Inglewood. Appellant was by himself, but was near another man. Suddenly, 10 to 12 police officers, with guns drawn, came out of different white vans. Some of the police wore plainclothes and some wore vests. The police told Tony, appellant and the other man to freeze and raise their hands. The other man ran away, but Tony and appellant complied. The officers had their guns drawn and grabbed appellant, handcuffed him and searched him. They took a cell phone from him and retrieved a backpack. Tony watched the police search an area which had bushes and return with a black firearm found in a bush. Tony was allowed to leave after 10 minutes, and appellant was taken into custody.

***Rebuttal***

A defense investigator, Robert Freeman, interviewed Tony. Tony did not indicate that he had been stopped by police and patted down, or that he raised his hands. Tony said he was in his car during the entire event.

Marshal Grunwald, who assisted in appellant's arrest, testified that no one other than appellant was ever detained, stopped or patted down at the time of appellant's arrest. The vehicles used in the operation were green minivans. There were no white vans in the marshal's fleet. Inspector Grunwald found the firearm in appellant's waistband during a patdown search.

## DISCUSSION

### I. Admissibility of evidence of threats to Cirieco

#### *A. Cirieco's statement to police*

On the evening of the incident, Cirieco told Officer Green that she saw a man put his arm around Marroquin's neck, strike her in the face, knock her to the ground and kick and stomp on her face. She reconfirmed her story at the hospital. The next day, after being admonished, she identified appellant in a photographic lineup, circling his photograph and writing next to it that appellant was "the one who beat up Wendy

Marroquin. I saw him kick her in the face a couple of times and stomp on her face." She added, "That is the guy. I am positive."

***B. Evidence Code section 402 hearing***

In the middle of Cirieco's trial testimony, the trial court conducted an Evidence Code section 402 hearing regarding the prosecution's efforts to introduce evidence that she was threatened by appellant or his associates in order to dissuade her from testifying. During the hearing, Cirieco testified that a friend contacted her about matters unrelated to the charged incident, but mentioned that she should not to come to court. She claimed she did not know her friend's "real name," but that he is known as "D." The caller and his "brother" wanted her to travel out of state with them but she did not go, at least in part, because she was frightened that something might happen to her. She was not intimidated by the calls, but was confused because she did not think the callers had anything to do with appellant's case. She did not know that appellant was also known as "D." She moved from where she was living after the incident, but claimed it had nothing to do with the case. She was not afraid to testify.

The prosecutor argued that evidence that someone told Cirieco not to testify should be admitted because she was testifying evasively and with selective memory, her testimony contradicted her prior statements that she was afraid to testify, and the telephone calls were important to explain why she recanted her pretrial statements. Defense counsel countered that Cirieco had the opportunity to tell the court that she was frightened, but did not. He argued that under Evidence Code section 352, the prejudice outweighed the probative value. He also argued that indicating that the caller's name was "D," when the prosecution intended to introduce evidence that "D" was appellant's nickname, would confuse the jury. Cirieco was not frightened to testify because the call occurred months before trial and was not reported to police. He argued that the evidence was speculative and not probative.

The trial court found Cirieco's answers to be "completely evasive" and believed she was lying. It determined that evidence that someone tried to dissuade her from testifying was relevant to her state of mind regarding testifying, and the jury was not

likely to be confused. It ruled that under Evidence Code section 352 the evidence was admissible, any prejudice was outweighed by its probative value, but that the prosecution had not met its burden of establishing that appellant authorized the calls.

***C. Cirieco's trial testimony***

At trial, Cirieco testified that before the preliminary hearing she received a telephone call from a friend, who she knew as "D," who told her not to go to court. He invited her to visit him out of town a month earlier than she had planned in order to avoid testifying. She claimed that "D" was not trying to intimidate her, but wanted her to know that she did not have to testify if she did not want to do so. She claimed that the telephone call did not frighten or intimidate her and that the "D" who called her was not appellant. After the incident, Cirieco changed her residence.

Cirieco denied seeing the face of Marroquin's attacker or what happened to Marroquin, but admitted positively identifying him in a six-pack and writing that he was the one who beat up Marroquin. She testified that she was not lying when she wrote this. She also did not recall seeing Marroquin being stomped and kicked or telling that to Officer Padilla. She testified that she could not remember the event or talking to Officer Green.

The trial court instructed the jury that there was insufficient evidence that appellant authorized the phone call and that it was only being introduced for the limited purpose of allowing the jury to assess the effect of the calls on Cirieco's testimony and the quality of that testimony.[2]

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[2] The trial court stated: "The court permitted evidence to be introduced regarding the fact that Kelly Cirieco—I think that's how you pronounce her name—had received a phone call telling her not to testify. This evidence was introduced for the limited or sole purpose of showing what if any affect this call may have had on Ms. Cirieco's testifying, her manner of testifying, and the quality of that testimony. It was not offered for the truth of the matter . . . . The evidence was not introduced to show that the defendant authorized the phone call as there was not sufficient foundational evidence at this time to show this. But it still comes in and it comes in for the limited purpose or sole purpose

### *D. Officer Green's trial testimony*

The prosecutor called Officer Green who testified to meeting with the prosecutor and Cirieco the previous day. Cirieco said that near the time of the preliminary hearing she received a couple of telephone calls from people who were friends or associates of appellant who offered to fly her to Atlanta. She thought it was to remove her from the state so that she would not testify. She explained that she did not accept the offer because she knew something was not right. She also told Officer Green before testifying the previous day, that she was afraid of someone retaliating against her.

### *E. Defense motion to strike Officer Green's testimony*

At the conclusion of Officer Green's testimony, defense counsel moved to strike the evidence regarding the telephone calls to Cirieco because there was nothing to corroborate it. The trial court denied the motion, but gave another cautionary instruction that the evidence was not admitted for the truth of the matter asserted but only for impeachment.[3]

### *F. Appellant's contention*

Appellant contends that the trial court erred in admitting evidence of the telephone calls attempting to dissuade Cirieco from testifying. He argues that the calls were

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that I told you. In order to evaluate Ms. Cirieco's testimony, you may consider those statements."

[3] This time the trial court instructed: "I also want to instruct you, once again, it is the same thing I said earlier, and it's a cautionary note again, about the telephone conversation that you were permitted to hear about. I think Officer Green's might have been slightly different than the other one that was told to you, but, in any event, the phone conversation is coming in for the limited purpose of the impact on the hearer of the conversation, Ms. Cirieco. It is not coming in for the truth of the matter. It doesn't matter whether it's true or not, and it's not coming in for that purpose. That's why I'm telling you, again, because we don't have that person here to cross-examine. But you're still entitled to know, I have ruled, because you are entitled to use that information, Ms. Cirieco's testimony and the impact it may have had on her in terms of her testifying and the quality of her testimony. So I repeat it again: It's a limited purpose that the conversation, the telephone conversation, the other side of the conversation, is coming in."

irrelevant because there was no evidence appellant authorized them and that they were unduly prejudicial. Admission of the evidence deprived him of due process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This contention lacks merit.

### *G. Evidence Code section 352 analysis*

#### *1. Relevance*

Except as otherwise provided by statute, "all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is all evidence "including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court has wide discretion in determining the relevance of evidence. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908.) A witness's "attitude toward the action" or "toward the giving of testimony" is relevant to the witness's credibility. (Evid. Code, § 780, subd. (j).)

"Evidence of threats to a witness is generally admissible on either or both of two theories. First, it is relevant on the question of the witness' credibility. [Citations.] Second, it may be admissible as tending to show a defendant's consciousness of guilt *if* the threats are linked sufficiently to the defendant. [Citations.]" (*People v. Lybrand* (1981) 115 Cal.App.3d 1, 11.) Evidence that a witness is afraid to testify and the basis of that fear are relevant to credibility of that witness and is therefore admissible, subject to the trial court's discretion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946; *People v. Warren* (1988) 45 Cal.3d 471, 481.) It is not necessary to show that the threats were made by the defendant personally or that the fear was linked to the defendant for the evidence to be admissible. (*People v. Burgener* (2003) 29 Cal.4th 833, 869-870.) The jury is entitled to learn the possible reasons for radically different versions of what occurred. "Defendant's contention that these threats must somehow be 'linked' to him [citation] is misdirected, as the prosecution never claimed that the witness' fear was the result of any effort on defendant's part to procure false testimony." (*People v. Green*

(1980) 27 Cal.3d 1, 20, disapproved on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225.)

Here, one or more people had contacted Cirieco and attempted to convince her not to testify. While Cirieco failed to make any connection between appellant and the telephone calls, Officer Green testified that Cirieco told him that the callers were friends or associates of appellant. But even this evidence was insufficient to establish the requisite connection between the caller and appellant to reflect on appellant's culpability. Simply because there is a relationship between a person threatening a witness and a defendant, is not, without more, sufficient to establish that the person was acting on the defendant's behalf. (*People v. Perez* (1959) 169 Cal.App.2d 473, 477-478.)

But the telephone calls are nevertheless relevant to Cirieco's credibility. Her testimony completely contradicted her statement to police at the time of the incident and identification of appellant as the perpetrator the following day. The trial court characterized her as a liar and her testimony as evasive. To the extent the telephone calls caused Cirieco to fear testifying, they were relevant to her credibility and to explain why she changed her story.

*2. Prejudice*

We must still determine if the probative value of the evidence outweighed the prejudice and or time consumption involved in its presentation, pursuant to Evidence Code section 352. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Review of a trial court decision pursuant to Evidence Code section 352 is subject to abuse of discretion analysis. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) "[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "When the question on appeal is whether the trial court has abused its discretion, the showing is

insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "'[I]n most instances the appellate courts will uphold its exercise whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

The trial court did not abuse its discretion in concluding that the probative value of the telephone calls outweighed its prejudice and potential to confuse the jury. The evidence of the telephone calls was comparatively brief and not so compelling to have significantly impacted the jury. It was not so predominant in the trial as to overshadow other evidence. The threats made in the calls, if any, were implicit and indirect, as Cirieco did not testify she was threatened but only that the callers sought to entice her not to attend court. Further, the jury twice received limiting instructions, informing it that the evidence was admitted only on the issue of the impact of the telephone calls on Cirieco's testimony and not for the truth of the matter asserted. The trial court advised the jury that there was insufficient evidence that appellant authorized the calls. It instructed with CALJIC No. 2.09, telling the jury not to consider evidence admitted for a limited purpose or any purpose other than that for which it was admitted, and CALJIC No. 2.20 that the jury was the sole judge of the credibility of witnesses.

Appellant was not deprived of his rights to due process and a fair trial guaranteed by the federal Constitution, as the admission of the challenged evidence did not infuse the trial with such unfairness as to lead to a miscarriage of justice. (*People v. Carswell* (1957) 149 Cal.App.2d 395, 402.)

***H. Harmless error***

Even if the trial court erred in allowing testimony regarding the telephone calls, the error was harmless in that it is not reasonably probable that had the testimony been excluded defendant would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) As discussed above, the jury received instructions carefully limiting the use of the challenged evidence. Additionally, the evidence against appellant was strong, if not

overwhelming. Marroquin identified him as the perpetrator. Cirieco also identified him in a photographic lineup the day after the assault. Hartzog testified that she saw appellant choking Marroquin. There was a footprint on Marroquin's face that matched the pattern on the bottom of appellant's shoe, which had dried blood on it.

## II. Limiting victim's cross-examination

Defense counsel sought to introduce evidence that Marroquin had recently been arrested and charged in a robbery and for driving the getaway vehicle in a shooting. The trial court appointed independent counsel to consult with her regarding her rights and privileges with respect to testifying about these prior bad acts. At an Evidence Code section 402 hearing, Marroquin testified that if questioned about the charges, she would assert her privilege against self-incrimination.

The trial court excluded the evidence under Evidence Code section 352 finding that its probative value was outweighed by its substantial prejudice, possible confusion and undue consumption of time.

Appellant contends that the trial court abused its discretion in excluding evidence of Marroquin's involvement in a robbery and driving the getaway car in a shooting, thereby depriving him of his constitutional rights to confront and cross-examine his accuser, to due process and a fair trial, and to present his defense. He argues that the evidence was "highly relevant and, in fact, was crucial to appellant's defense and such probative value greatly outweighed any prejudice to the state."

### *A. Impeachment with prior criminal misconduct*

Before enactment of Proposition 8 in 1982, the Evidence Code precluded impeaching a person with specific acts of prior criminal misconduct other than a felony conviction. (Evid. Code, §§ 787-788; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.) Proposition 8 abrogated this rule by adopting article I, section 28(d) of the California Constitution, the "'Truth-in-Evidence'" amendment, which declared that "'relevant evidence shall not be excluded in any criminal proceeding'" unless the Legislature provides otherwise by a two-thirds vote of each house. Consequently,

broader evidence of prior criminal conduct is now admissible. (*People v. Wheeler* (1994) 4 Cal.4th.284, 291-292 (*Wheeler*).)

Any felony conviction involving moral turpitude, even if the immoral trait is other than dishonesty, may be admissible.[4] (*People v. Green* (1995) 34 Cal.App.4th 165, 182.) This is because "'it is undeniable that a witness' moral depravity of any kind has "some tendency in reason" [citation] to shake one's confidence in his honesty. . . . [¶] There is . . . some basis . . . for inferring that a person who has committed a crime which involves moral turpitude [even if dishonesty is not a necessary element] . . . is more likely to be dishonest than a witness about whom no such thing is known. . . .'" (*Wheeler*, *supra*, 4 Cal.4th at p. 295.)

Since passage of Proposition 8, past criminal conduct involving moral turpitude, even if it did not result in a felony conviction, is admissible to impeach witnesses in a proper case. (*Wheeler*, *supra*, 4 Cal.4th at pp. 295-296; *People v. Green*, *supra*, 34 Cal.App.4th at p. 182.) "[S]ection 28(d) makes immoral conduct admissible for impeachment whether or not it produced any conviction, felony or misdemeanor. . . . Thus, impeaching misconduct now may, and sometimes must, be proven by direct evidence of the acts committed. These acts might not even constitute criminal offenses. Under such circumstances, fairness, efficiency, and moral turpitude become more complicated issues. Courts may take these facts into account when deciding under Evidence Code section 352 whether to admit evidence other than felony convictions for impeachment." (*Wheeler*, *supra*, at p. 297, fn. 7.) Consequently, prior misdemeanor conduct involving moral turpitude is admissible. (*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1522.) Pending charges for offenses involving moral turpitude are admissible to show that a witness may be testifying in order to seek leniency. (See

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[4] Moral turpitude is a willingness to lie (*People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1522) or a "'general readiness to do evil'" (see *People v. Castro* (1985) 38 Cal.3d 301, 314, italics omitted).

*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.) Evidence of the underlying misconduct involving moral turpitude, as distinct from a conviction for the misconduct, is admissible. (*People v. Lopez¸ supra*, at p. 1522; *Wheeler, supra*, at pp. 295, 300, fn. 14 [suggesting, in dictum, that misconduct in lieu of conviction may be used for impeachment]; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1080-1081 ["It is long-standing law that a prosecution witness can be impeached by the mere fact of pending charges" to show he may be seeking leniency by testifying].)[5]

But Section 28(d) of the California Constitution makes clear that "'nothing in [that] section shall affect any existing statutory rule of evidence relating to . . . hearsay, or Evidence Code [section] 352.'" (*Wheeler, supra,* 4 Cal.4th at p. 291.) The admissibility of past misconduct is therefore limited "at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Id.* at p. 296.)

In exercising its discretion regarding moral turpitude conduct, "a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area. [Citations.] But additional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time,

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**5** Evidence of arrests is inadmissible because it would seriously impair the witness's credibility while having only a weak thread of relevance on bad character. (*People v. Lopez, supra,* 129 Cal.App.4th at p. 1523.)

confusion, or prejudice which outweighs its probative value." (*Wheeler, supra,* 4 Cal.4th at p. 296, internal footnotes omitted.)

***B. Standard of review***

As discussed in part IG2, *ante*, "Review of a trial court decision pursuant to Evidence Code section 352 is subject to abuse of discretion analysis. [Citations]." (*People v. Greenberger, supra,* 58 Cal.App.4th at p. 352.)

***C. Evidence Code section 352 analysis***

*1. Relevance*

Applying the foregoing principles here, we consider whether the trial court abused its discretion by finding the relevance of the charges pending against Marroquin to be substantially outweighed by the danger of undue prejudice, consumption of time and/or confusion of the jury. Among the factors often considered in making this assessment are whether the prior conviction (1) reflects on honesty and integrity, (2) is near or remote in time to the charged offense, (3) is the same or substantially the same as the charged offense, and (4) the effect of the admission on the defendant's decision to testify. (*People v. Castro, supra,* 38 Cal.3d at p. 307.) Factor No. 1 has the clearest application where the person subject to impeachment is not the defendant.

The record here indicates that Marroquin was charged in a robbery and in driving a getaway car in a shooting, thereby assisting a person with the intent to help him avoid arrest with knowledge he had committed a felony, pursuant to section 32. Both are crimes of moral turpitude. (*In re Paguirigan* (2001) 25 Cal.4th 1, 5; *In re Young* (1989) 49 Cal.3d 257, 264.) While those crimes suggest a "'general readiness to do evil,'" they do not directly or necessarily suggest dishonesty in the same way, for example, that the crime of perjury does. "Obviously it is easier to infer that a witness is lying if the felony of which he has been convicted involves dishonesty as a necessary element than when it merely indicates a 'bad character' and 'general readiness to do evil,'" although both constitute moral turpitude. "Nevertheless, it is undeniable that a witness' moral depravity of any kind has some 'tendency in reason' [citation] to shake one's confidence in his honesty." (*People v. Castro, supra,* 38 Cal.3d at p. 315.)

Also germane to the question of relevance is that the impeaching misconduct consists only of pending charges, not convictions. "A felony conviction reliably establishes that the witness committed corresponding criminal acts; a party or witness is unlikely to be surprised by use of felony convictions for impeachment; and the court must determine moral turpitude solely from the 'least adjudicated elements' of the conviction. [Citation.]" (*Wheeler, supra,* 4 Cal.4th at p. 297, fn. 7.) The same cannot be said for pending charges which are more speculative, less relevant to credibility and may, and sometimes must, be proven by direct evidence of the acts committed. Pending charges therefore involve additional considerations in an Evidence Code section 352 analysis. (*Wheeler, supra,* at p. 297, fn. 7.) Because there is no conviction, trial courts face the possibility of, in essence, having to try these collateral charges in the current trial, thereby consuming an undue amount of time. Admission of pending charges also strikes at our fundamental notion that a person is innocent until proven guilty. The mere filing of charges against a person is evidence of nothing, if the presumption of innocence is to mean anything.

Finally, Marroquin stated that she would assert her privilege against self-incrimination if called to testify regarding her pending charges. If she were to do so, and the prosecutor was unprepared to present other evidence of her misconduct, all that would be accomplished by allowing such impeachment would be to prejudice the jury with an assertion that the answer might tend to incriminate the witness, without providing any relevant information on the question. While the jury would be instructed that the assertion of the privilege could not be a basis for drawing a negative inference about Marroquin's credibility (Evid. Code, § 913, subd. (a); see *In re Scott* (2003) 29 Cal.4th 783, 816), such an instruction would be of questionable value once "the cat was out of the bag."

*2. Prejudice*

Against the comparatively meager relevance of the pending charges, the prejudice and consumption of time that would be caused by their admission is considerable. As mentioned above, introducing evidence of the pending charges and underlying

misconduct could complicate the trial and lead to a time consuming trial on these unrelated charges. And if Marroquin asserted her privilege against self-incrimination before the jury, with no evidence to support the charges, the prosecution's key witness could be substantially undermined with no evidentiary benefit. We cannot say that the trial court abused its discretion in concluding that these factors outweighed the relevance of the pending charges.

***D. Right to present a defense, confrontation and due process***

We reject defendant's constitutional claims that he was deprived of his constitutional right to present a defense, to due process and to confront the witnesses against him by virtue of the excluded evidence. "'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level . . . .'" (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Similarly, the confrontation clause does not prevent the trial court from placing reasonable limits on cross-examination. (*People v. Ledesma* (2006) 39 Cal.4th 641, 704-705; *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.) The touchstone of due process is fundamental fairness. (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1250.)

While the trial court precluded evidence of, and limited cross-examination of the charges pending against Marroquin, there was substantial other evidence to impeach her testimony. McKnight and Aeriel both testified that they did not see appellant do anything before Marroquin hit him in the face with a glass. They saw her fighting with other females, intoxicated and using foul language and screaming. Appellant was only precluded from introducing evidence of her pending unproven charges, not from challenging her credibility. This restriction did not compromise the fundamental fairness of the trial.

***E. Harmless error***

Even if we were to conclude that excluding evidence of Marroquin's pending charges and the underlying conduct was erroneous, we would nonetheless find it to be

harmless in that it is not reasonably probable that a result more favorable to defendant would have been obtained. (See *People v. Castro, supra,* 38 Cal.3d at p. 319; *People v. Watson, supra,* 46 Cal.2d at p. 836.) As we have earlier discussed, the evidence against appellant was compelling.

**III. Backpack evidence**

During cross-examination, Officer John Ferreria testified that when arresting appellant, his backpack did not contain any weapons, ammunition or clips. On redirect examination, without objection, he testified that the backpack contained a woman's purse, a woman's identification card, a makeup bag, a sexual toy, and change and credit cards. When asked if there were any other items in the backpack "with other people's names on [them]," and what they were, defense counsel interposed a relevancy objection.

At sidebar, the prosecutor admitted that the items in the backpack were not related to any charge. She argued that defense counsel opened the door by asking if there was a gun in the backpack. The evidence showed, she argued, that the backpack did not belong to appellant and was stolen and that is the reason there was no gun. The trial court disagreed and questioned whether the contents of the backpack indicated that it did not belong to appellant. Defense counsel began to object under Evidence Code section 352, when the court sustained the original objection, ruling that the answer that was given would remain, but there would be no further questioning on that subject.

Appellant contends that the trial court erred in failing to strike the evidence of the contents of the backpack, depriving him of his Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial. Respondent contends this claim has been forfeited. We agree with respondent.

Defense counsel made no objection to the initial question regarding the contents of the backpack or a motion to strike the answer. A relevance objection was interposed only to the subsequent question of what "other items with other people's names on [them]" were in the backpack. A challenge to the admission of evidence is waived by failing to object or move to strike in the trial court. (*People v. Montiel* (1993) 5 Cal.4th 877, 932.)

## IV. Cumulative error

Appellant contends that even if the above asserted errors were not individually prejudicial, their cumulative effect was overwhelming and denied him his state and federal constitutional rights to due process of law.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have concluded that appellant's claims of error are meritless, there are no errors to cumulate.

## V. Striking prior prison enhancements

Appellant was convicted of assault by means likely to produce great bodily injury, being a felon in possession of a firearm, being a felon in possession of a concealed firearm, being a felon in possession of a loaded firearm in a public place and being a felon in possession of ammunition. He admitted two prior felony convictions. The trial court sentenced him to three years on the assault conviction, doubled as a second strike, plus five years for the habitual-offender enhancement contained in section 667, subdivision (a) and three years for personally inflicting great bodily injury. It imposed and stayed 1-year prior prison terms for each of the two priors that appellant admitted pursuant to section 667.5, subdivision (b).

Appellant contends that the trial court erred in staying the prior prison term enhancements. He argues that both prior prison term enhancements should have been stricken and not stayed because that is the appropriate procedure when the trial court does not intend to impose them. He further argues that the prior conviction that was used to impose the habitual offender enhancement under section 667, subdivision (a) cannot support a dual use as a prior prison enhancement. Respondent agrees as do we.

The five-year enhancement, under section 667, subdivision (a), and one of the stayed prior prison term enhancements were improperly based on the same conviction. As a result, the latter must be stricken. (*People v. Jones* (1993) 5 Cal.4th 1142, 1153.) A

prior prison term enhancement must be stricken or imposed, it cannot be stayed. (*People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) Hence, the second prior prison term enhancement must be stricken and not stayed as the trial court clearly indicated its desire and intent not to impose it, and respondent requests that it be stricken.

**DISPOSITION**

The prior prison term enhancements are stricken and the judgment is otherwise affirmed. On remand, the trial court is directed to modify the abstract of judgment in accordance with this decision.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ